IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. 548

NICK ALFRED AGUILLAR,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE RESPONDENT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas (R.77; R.85) are reported at 172 Tex. Crim. 629, 362 S.W. 2d 111 (1962).

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered June 20, 1962 (R.77). A Motion for Rehearing was filed on July 3, 1962 (R.79), and denied October 31, 1962 (R.85); a Second Motion for Rehearing was overruled without written opinion on November 28, 1962 (R.88). The Petition for Writ of

Certiorari and Motion for Leave to appeal in forma pauperis were filed in this Court on February 25, 1963, and certiorari was granted October 14, 1963. The Petitioner has invoked the jurisdiction of this Court under Title 28, U.S.C.A., Sec. 1257 (3).

QUESTIONS PRESENTED

The questions presented are:

1. Whether the provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States requiring "probable cause" for the issuance of a search warrant were met (as was judicially determined by a magistrate), where the affidavit supporting the issuance of the warrant read as follows:

> "A certain building, house and place occupied and used as a private residence, located in Harris County, Texas, described as a one story green frame building, located at 509 Pickney Street, in the City of Houston, County of Harris and in the State of Texas and all out buildings and motor vehicles pertinent to the above described premises; and being the building, house or place of Nick Alfred Aguilar a Mexican male and other person or persons unknown to the affiants by name, identity or description, is a place where we each have reason to believe and do believe that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; that on or about the 8th day of January, A.D. 1960, Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described

premises for the purpose of sale and use contrary to the provisions of the law."

2. Whether all search warrants issued by magistrates in the State of Texas are void unless they conform to the requirements of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT FOUR, CONSTITUTION OF THE UNITED STATES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT FIVE, CONSTITUTION OF THE UNITED STATES

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT FOURTEEN, CONSTITUTION OF THE UNITED STATES

"Section 1. All persons born or naturalized in

the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, SECTION 9, TEXAS CONSTITUTION

"The people shall be secure in their person, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

ARTICLE 4, TEXAS CODE OF CRIMINAL PROCEDURE

"The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches. No warrant to search any place or to seize any person or thing shall issue without describing them as near as may be, nor without probable cause supported by oath or affirmation."

ARTICLE 725b, SECTION 16, VERNON'S PENAL CODE OF THE STATE OF TEXAS

"Whenever any officers or employee of the Department of Public Safety or any peace officer who has the authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magis-

trate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative thereto, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act."

ARTICLE 727a, VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE OF TEXAS

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

62 STAT. 819 (1948); 18 U.S.C., SECTION 3104; RULE 41(c) FEDERAL RULES OF CRIMINAL PROCEDURE

Search and Seizure: (c) Issuance and Contents.

"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime,

but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

STATEMENT OF THE CASE

The Petitioner was charged by indictment with the offense of unlawfully possessing heroine, a narcotic drug, in violation of Article 725b of the Texas Penal Code (R.1). A jury in Criminal District Court of Harris County, Texas, rejected the Petitioner's plea of not guilty and assessed his penalty at confinement in the State Penitentiary for twenty years (R.4). The conviction was appealed to the Court of Criminal Appeals of Texas, which is the highest court having criminal jurisdiction in the State. The conviction was affirmed on the 20th day of June, 1962 (R. 77). Petitioner's Motion for Rehearing in the Court of Criminal Appeals of Texas was denied on the 31st day of October, 1962, by written opinion (R.85). The Second Motion for Rehearing was denied without written opinion on the 28th day of November, 1962 (R.88). The opinions (R.77 and R.85) are reported in 172 Tex. Crim. 629, 362 S.W. 2d 111.

The City of Houston Narcotics Officers Strickland and Rodgers, in the company of other officers and armed with a search warrant for the premises at 509 Pinckney Street in Houston, Texas, went to the address and knocked on the door (R.14,15). The knock was answered by a voice asking who was there (R.15,17). Strickland replied they were police officers and had a search warrant for that location (R.15,17). The officers heard scuffling inside and someone started to run (R.30,39). The officers then opened the door and saw

the Petitioner running toward the rear of the house (R.31,39). After pursuing the Petitioner through the house to the bathroom, they saw him throw a package into the commode which he attempted to flush (R.31), 40). The Petitioner was pulled away from the commode and the package was retrieved (R.31,40). The package contained six blue cellophane papers in which there was "white powder" (R.32,40). A chemical analysis proved the white power in each paper to be 36.5 grams of 36.5% pure heroine (R.46,47).

The officers who executed the affidavits to secure the search warrant had gained reliable information from a credible person that the Petitioner had in his possession at his residence narcotics (R.20). After receiving this first information, the officers waited for a time before obtaining the search warrant in order to keep the house under surveillance, undoubtedly to verify their information (R.22). Thereafter, they executed the affidavit which stated that:

> "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law."

Based upon these facts and the affidavit the magistrate to whom it was presented made a judicial determination that probable cause existed for the issuance of the search warrant which was utilized by the officers in gaining entrance to the Petitioner's residence.

Respondent denies each and every allegation of fact stated by Petitioner in his brief, except those facts supported by the record and those facts specially admitted by the Respondent.

ARGUMENT

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The same safeguards are contained in The Texas Constitution, Article 1, Sec. 9, which provides:

> "The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

The issuance of search warrants to search for narcotics is authorized by Article 725b, Sec. 16, of Vernon's Ann. Texas Penal Code, and reads in parts as follows:

> "Whenever any officers or employee of the Department of Public Safety or any peace officer who has the authority to and is charged with the duty of enforcing the provisions of this Act, shall have reason to believe that any person has in his possession any narcotic drugs contrary to the provisions hereof, he may file, or cause to be filed his sworn complaint to such effect before any magistrate of the county in which any such narcotic drugs are located, and procure a search warrant and examine the same. The application for the issuance of and execution of any such search warrant hereunder, and all proceedings relative there-

to, shall conform as near as may be to the provisions of Title 6 of the Code of Criminal Procedure, except where otherwise provided in this Act."

The Petitioner here relies primarily upon the case of *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503. The fundamental premise of the Petitioner seems to be that there is no distinction between the Giordenello case and the case at bar. He insists further that the case of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, requires that the Court of Criminal Appeals of Texas follow precisely the decision in the Giordenello case regarding the application of the Federal Rules of Criminal Procedure.

It is to be remembered that the prosecution of Giordenello originated in the Federal Court. Necessarily the sufficiency of the warrant for the arrest of Giordenello was tested by Rules 3 and 4 of the Federal Rules of Criminal Procedure. This Honorable Court decided that the complaint was not sufficient, which read as follows:

> "The undersigned complainant (Finley) being duly sworn states that on or about January 26, 1956, at Houston, Texas, in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride with knowledge of the unlawful importation in violation of Section 174, Title 21, United States Code."

This Honorable Court stated:

> "When the complaint in this case is judged with these consideratic ns in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the

affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

In the present case, the arresting officers obtained a search warrant based upon an affidavit reading in part as follows:

". . . Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

In the Giordenello case, there was a mere recitation that Giordenello "did receive, conceal, etc., a narcotic drug" without any allegations regarding the source of the affiant's knowledge and information, if he had any before obtaining the warrant.

In the present case, two affiants swore not only that the Petitioner unlawfully possessed narcotic drugs, but they swore that they *believed* that he had narcotic drugs in his possession for the purpose of sale, and further that they had been informed (and believed the information to be reliable) by a credible person that the Petitioner had unlawfully in his possession narcotic drugs. The affiants were saying that a credible person told them that the Petitioner possessed narcotic drugs in his residence described in the affidavit.

It is quite clear that the affidavits in this case and the Giordenello case are distinguishable. Probable cause was established in the present case as measured by the applicable standards of the Constitution of the United States and the constitutional and statutory provisions of the State of Texas.

The Petitioner has argued that portions of the affidavit in this case were based upon "information and belief, mere hearsay." His answer is that hearsay has been held to be sufficient to establish probable cause. *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327; *Brinegar v. United States,* 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; and see *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697.

It is submitted that the requirements of the Fourth and Fourteenth Amendments to the Constitution of the United States have been met. The affidavit states sufficient facts and information to constitute probable cause for the issuance of the search warrant. A Judicial determination that probable cause existed for the issuance of the warrant was made when the magistrate issued the warrant.

Although the Respondent strenuously urges that the affidavit in question need not be measured by the Federal Rules of Criminal Procedure, it is respectfully urged that it does meet those requirements. *United States v. Eisner,* 297 F.2d 595 (6th Circuit 1962); *United States v. Rugendorf,* 316 F.2d 589 (7th Circuit 1963).

It is further submitted that it would appear that the affidavit in the Giordenello case could not "pass muster" in the State courts in the State of Texas.

The Petitioner is critical of the Court of Criminal Appeals of Texas as he says they have ". . . so illogically construed Mapp v. Ohio, 367 U.S. 643."

The Legislature of the State of Texas in 1925 enacted a statute (Article 727a, Vernon's Ann. Code of Criminal Procedure) which requires the exclusion of

all evidence illegally obtained. The courts of the State of Texas have since that time arduously applied the rule excluding evidence obtained by an unlawful search and seizure. This has already been recognized by this Court. See Appendix to the Opinion of the Court in *Elkins v. United States,* 364 U.S. 206, 224, 80 S.Ct. 1437, 4 L.Ed. 2d 1669.

Petitioner futher complains that the Court of Criminal Appeals of Texas did not discuss *Giordenello v. United States,* 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503, in its opinion in this case. The Court of Criminal Appeals of Texas has on at least two occasions discussed the Giordenello case. *Giacona v. State,* 169 Tex. Crim. 101, 335 S.W. 2d 837; and *Etchieson v. State,* — Tex.Crim. —, 372 S.W. 2d 690. In each of the cases discussed, the Court pointed out the distinction between the affidavit in the Giordenello case and those in legal effect the same as in the present case.

The Respondent does not understand *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed. 2d 108; and *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726, to hold that Rules 3, 4 and 41 and the Giordenello case are as binding on the States as the constitutional provisions themselves. The Petitioner expresses a contrary understanding in his brief:

> "Thus, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Federal Rules 3, 4 and 41 are brought into interplay in this one instrument denominated a 'Search Warrant'." (Petitioner's Brief, p. 10)

It is believed that the Petitioner's position is not sound, as will be demonstrated by quotations from the opinions he professes to rely upon.

This Honorable Court's clear expression appearing

in *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726, was:

> "Preliminary to our examination of the search and seizures involved here, it might be helpful for us to indicate what was not decided in Mapp. First, it must be recognized that the 'principles governing the admissibility of evidence in federal criminal trials have not been restricted * * * to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts * * * this court has * * * formulated rules of evidence to be applied in federal criminal prosecutions.'
>
> ". . . Mapp, however, established no assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger, 371 U.S. 392, 401, 83 S.Ct. 385, 390, 9 L.Ed. 2d 390 (1963), and consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. Mapp sounded no death knell for our federalism . . ."
>
> "This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth

Amendment and in opinions of this Court applying that Amendment. . . ."

". . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

If the Petitioner's argument is valid as to the application of Rules 3, 4 and 41(c) of the Federal Rules of Criminal Procedure, why should it be limited to the State rules? Why should not all of the Rules of Federal Procedure be binding upon the States? For example, Petitioner correctly states a Motion to Suppress Evidence, as is recognized in federal procedure, is not recognized in the Texas courts. *Bailey v. State*, 157 Tex. Crim. 315, 248 S.W. 2d 144. Would it not be as logical to argue that Rule 41(e) of the Rules of Criminal Procedure should be applied in Texas courts, permitting the accused to move to suppress allegedly illegally obtained evidence before the trial on the merits? Is not the Petitioner urging that *Mapp v. Ohio* did sound the "death knell for our federalism"?

It is respectfully submitted that in light of the "fundamental criteria" laid down by the Fourth and Fourteenth Amendments and the decisions of this Honorable Court, no fundamental right has been denied the Petitioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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SERVICE

I, Carl E. F. Dally, Assistant District Attorney, Harris County, Texas, am a member of the Bar of the Supreme Court of the United States, and I have heretofore entered my appearance in the Supreme Court of the United States in the above captioned cause in behalf of the Respondent; I certify that a copy of the foregoing brief has been forwarded by United States Mail, with first class postage prepaid, to Petitioner's Attorney of Record, Mr. Clyde W. Woody, 1114 Texas Avenue Building, Houston, Texas 77002, on this the ---- day of February, 1964.

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